NO. 22657

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DON WADE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS

DISCLOSING JURISDICTION

On December 21, 1966, the Federal Grand Jury for the Central District of California returned a one-count indictment charging Don Wade (hereinafter referred to as "defendant") with violating Title 18, United States Code, §2113 (a) and §2113 (d) [T. R., p. 2]. [1/] The indictment charged as follows:

> On or about November 23, 1966, in Los Angeles County, within the Central District of California,

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1/ "T. R." refers to Transmitted Record herein.

defendant Don Wade, by force and violence and by intimidation, knowingly and willfully took from Susan P. Blom and Lela Kinsey, $2,841.20, belonging to, and in the care, custody, control, management and possession of Century Bank, 2028 Westwood Blvd., West Los Angeles, a member bank of the Federal Reserve System and a bank whose accounts were insured by the Federal Deposit Insurance Corporation.

In committing the offense heretofore charged, defendant Don Wade assaulted and put in jeopardy the lives of Susan P. Blom and Lela Kinsey by the use of a revolver, a dangerous weapon and device.

On October 13, 1967, after a trial by jury, the defendant was found and adjudged guilty as charged of violating Title 18, United States Code, §§2113 (a) and 2113 (d) [T. R.,pp. 46, 47]. On October 20, 1967, the defendant filed a timely Notice of Appeal [T. R., p. 48].

Jurisdiction of the District Court was based on Title 18, United States Code, §3231 and Title 18, United States §§2113 (a) and 2113 (d). Jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is based on Title 28, United States Code, §§1291 and 1294.

II

STATUTES AND RULES INVOLVED

Title 18, United States Code, §§2113 (a) and 2113 (d) provide, in pertinent part, as follows:

> "(a) Whoever, by force and violence, or by intimidation, takes . . . from the person or presence of another any . . . money . . . belonging to, or in the care, custody, control, management, or possession of, any bank . . . [s]hall be fined not more than $5,000 or imprisoned not more than twenty years, or both . . .
>
> (d) Whoever, in committing . . . any offense defined in subsection[s] (a) of this section, assaults any person, or puts in jeopardy the life of any person by the use of any dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

Title 18, United States Code, §4244 provides as follows:

> "Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally

incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused

shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury."

Federal Rule of Criminal Procedure 28 provides, in pertinent part, as follows:

". . . The Court may appoint any expert witnesses of its own selection . . . A witness so appointed shall advise the parties of his findings, if any, and may be thereafter called to testify by the court or by any party. He shall be subject to cross-examination by each party . . ."

III

A. DID THE TRIAL COURT ERR BY CONDITIONING DEFENDANT'S RAISING THE DEFENSE OF INSANITY UPON HIS FIRST SUBMITTING TO A MENTAL EXAMINATION BY A COURT-APPOINTED PSYCHIATRIST AND HIS AFFORDING SAID PSYCHIATRIST SUCH COOPERATION AND INFORMATION AS MAY BE REQUIRED IN PROPERLY CONDUCTING THE MENTAL EXAMINATION?

B. DID THE TRIAL COURT ERR BY INSTRUCTING THE JURY ON THE DEFENSE OF INSANITY IN THE TERMS OF THE INSANITY TEST PRESENTLY APPROVED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NAMELY, THAT INSTRUCTION CONTAINED IN MATHES AND DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §10.14.

IV

STATEMENT OF FACTS

A. PRE-TRIAL

1. On December 27, 1966, defendant made a motion for an appointment of a psychiatrist. Said motion was granted, but subsequently defendant moved for and was granted an order vacating the appointment of said psychiatrist [T.R. p., 3].

2. On January 5, 1967, the defendant moved for and was granted an order directing the U.S. Marshal to deliver the defendant to his private psychiatrist. Contemporaneous with said order, the trial court granted the Government's motion for the appointment of a psychiatrist for the purpose of reporting to the court whether: (1) the defendant was sane; (2) the defendant was then able to understand the proceedings against him; (3) the defendant was able to assist in his own defense; (4) the defendant's probable prognosis with respect to the above questions; and (5) whether the defendant was legally insane at the time of the commission of the offense [T. R., pp. 4-6].

3. On the advice of his counsel, defendant refused to cooperate with the court-appointed psychiatrist with respect to an examination as to whether or not he was legally insane at the time of the offense [T. R., pp. 13, 18-19].

4. The trial court, on January 23, 1967, found the defendant sane and able to understand the proceedings against him [T. R. p. 8].

5. On January 30, 1967, defendant moved the trial court for an order vacating that portion of the Order Appointing Psychiatrist of January 5, 1967, which pertained to an examination of whether defendant was legally insane at the time of the offense and requiring him to cooperate and afford such information as may be required in properly conducting such a mental examination [T. R., p. 17].

6. On February 28, 1967, the trial court denied

defendant's motion [Memorandum Opinion, T. R. pp. 13-16].

7. On March 2, 1967, the trial court ordered that defendant would be precluded from offering any evidence on the defense of insanity unless he "afford such cooperation and information to the court-appointed psychiatrist as may be required in properly conducting such examination . . ." [T. R., p. 22].

8. On June 8, 1967, the trial court ordered the appointment of two additional psychiatrists, Drs. Karl Von Hagen and Seymour Pollack, to examine the defendant and report to the trial court with respect to, among other things, the question of whether defendant was legally insane at the time of the offense [T. R., pp. 26-29].

9. On August 16, 1967, the trial court ordered the appointment of psychologist Leonard B. Olinger as an examining psychologist in the case [T. R., p. 33].

B. TRIAL

1. At approximately 10:45 A. M., on November 23, 1969, the defendant appeared in the Century Bank, and shouted, "This is a stickup. Everybody get to the back of the bank." [R. T., pp. 70, 72, 81, 86]. 2/

2. Defendant pointed a gun at teller Susan Blom and kept saying, "Don't look at me. Don't look at me. . . . Fill." [R. T., p. 71].

2/ "R. T." refers to Reporter's Transcript herein.

3. It was stipulated that the Century Bank was a member of the Federal Reserve System, and a bank the deposits of which were insured by the Federal Deposit Insurance Corporation [R. T., p. 79]. Loss to the bank was stipulated to be $2,841.20 [R. T., p. 79].

4. At the time of the robbery the defendant wore a bandage or tape on his right cheek [R. T., p. 91]; wore a dark hat, dark suit, a tie and sunglasses [R. T., p. 94]; and made his getaway in a red Austin-Healey convertible [R. T., p. 95], which was stolen on November 23, 1966 [R. T., pp. 97-98].

5. Defendant confessed to committing the bank robbery [R. T., pp. 102-103], after being arrested immediately after the robbery [R. T., pp. 108-115] and subsequently admitted using the tape to hide a blemish [R. T., p. 132].

6. Defendant testified that on the day prior to the bank robbery that he approached the bank with a revolver in his belt, had the impulse to rob the bank, but was able to control it [R. T., pp. 285-286].

7. Defendant further testified that on the day of the robbery he stole a red Austin-Healey [R. T., pp. 288-291], but could remember only a few details after stealing the vehicle [R. T., pp. 291-308].

8. Dr. Hacker, called as a witness for the defense, testified that, at the time of the offense, the defendant was suffering from an emotional disorder; that the defendant probably had periods in which he was not totally aware of what he was

doing; and that there were periods in which the defendant could not conform his conduct to the thoughts he possessed [R. T., p. 319].

9. Dr. Cohn, also called as a defense witness, testified that on the date of the offense, the defendant was not able to distinguish between right and wrong and that he was not able to understand the nature of his act [R. T., p. 357]; that the defendant was suffering from a psychotic depression [R. T., p. 358]; and that he lacked the substantial capacity to conform his conduct to the requirements of the law [R. T., p. 359, 369].

10. Defendant made a motion to exclude the testimony of any court-appointed psychiatrist based on the privilege of self-incrimination and said motion was denied by the trial court [R. T., p. 414].

11. Dr. Olinger, a psychologist called as a witness for the Government, testified that on the date of the offense the defendant knew the difference between right and wrong; that he knew the nature and quality of his acts [R. T., p. 421]; and that his testing showed no evidence of psychosis or brain damage [R. T., p. 422].

12. Dr. Pollack, called as a Government witness, testified that the defendant was sane at the time of the commission of the offense [R. T., p. 475]; that he was capable of differentiating between right and wrong; that he was aware of the nature and quality of his acts [R. T., p. 476]; that he was capable of exercising his will, power or volition; that he did not have a mental disease or defect [R. T., p. 477]; and that he was capable of

conforming his conduct to the law [R. T., p. 478].

13. Dr. Von Hagen, also called to testify by the Government, testified that on the date of the commission of the offense, that the defendant was sane; that his actions were not beyond his control; that he did not have any mental disease [R. T., p. 527]; and that he was able to conform his conduct to the requirements of the law [R. T., p. 528].

14. Mr. Barron, a Lieutenant employed by the Los Angeles Police Department, testified as to the oral confession made by the defendant on the day of the robbery [R. T.,pp. 558-9].

V

ARGUMENT

A. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S CONSTITUTIONAL PRIVILEGE AGAINST SELF-INCRIMINATION BY CONDITIONING DEFENDANT'S RAISING THE DEFENSE OF INSANITY UPON HIS FIRST SUBMITTING TO A MENTAL EXAMINATION BY A COURT-APPOINTED PSYCHIATRIST AND HIS AFFORDING SAID PSYCHIATRIST SUCH COOPERATION AND INFORMATION AS MAY BE REQUIRED IN PROPERLY CONDUCTING THE MENTAL EXAMINATION.

1. The Constitutional Privilege Against Self-Incrimination Does Not Extend To Protect An Accused From Being Examined By A Court-Appointed Psychiatrist As To Whether Or Not The Accused Was Legally Insane At The Time Of The Commission Of The Offense Charged If There Is Reasonable Cause To Believe That Such An Issue Will Be Raised At Trial.

(a) The trial court properly exercised its "inherent power" to order defendant's examination by a court-appointed psychiatrist as to the question of whether or not the defendant was legally insane at the time of the commission of the offense charged.

Title 18, United States Code, §4244, supra, explicitly provides for the duties and conditions under which a motion for a psychiatric examination may be made. Although §4244 does not contain an express provision for a court-appointed psychiatrist to examine an accused as to his mental condition at the time of the commission of the offense, it cannot reasonably be concluded,

therefore, that no such power exists in the trial court. 3/ On the contrary, it has been held that a federal district court has the inherent power to require a psychiatric examination of an accused as to the issue of insanity at the time of the offense where such issue is raised at trial by the defendant. United States v. Albright, 388 F. 2d 719 (4th Cir. 1968); see also Alexander v. United States, 380 F. 2d 33 (8th Cir. 1967); Pope v. United States, 372 F. 2d 710 (8th Cir. 1967), vacated on other grounds, 392 U.S. 651 (1968); Winn v. United States, 270 F. 2d 326 (D. C. Cir. 1959). Although in United States v. Albright, supra, the issue of defendant's mental condition at the time offense was not clearly raised until the day trial began, the court in Albright relied upon Winn v. United States, supra, to support its holding. The appellate court in Winn was concerned with the trial court's denial of the government's pre-trial motion for a . . . "complete and thorough mental examination . . ." Winn v. United States, supra, at 327. The trial court in Winn granted an order limiting the examination solely to the issue of the defendant's mental competency to stand trial. The appellate court, in reversing the conviction, stated at 327 and 328 as follows:

3/ See Federal Rule of Criminal Procedure 28 which provides, in pertinent part, as follows:
". . . The court may appoint any expert witnesses . . . of its own selection . . . A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party . . ."

". . . the prosecutor who knows that the accused's mental state at the time of the crime will be the critical issue at the trial . . . has an obligation to see to it that any pre-trial mental examination of the accused that may be ordered be broad enough to cast light on that issue . . .

"It is true that D. C. Code §24-301 (Supp. VII, 1959) provides only for an examination limited to trial competency. But nothing in that statute or anywhere else in the law prevents the court, in a case where it is obvious that the trial will revolve about the issue of the accused's mental state at the time of the crime, from ordering such examinations as will produce the evidence required to determine that issue . . ."[4/]

It is asserted at page 16 of Appellant's Opening Brief that:

". . . the prosecution is not empty handed. It may present evidence of the defendant's behavior before, during and after the alleged crime; it may question the expert witness for the offense as to the basis of any opinion he presents and ask an expert for the prosecution to present his own opinion based on

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4/ See also Mitchell v. United States, 316 F. 2d 354, 360 (D. C. Cir. 1963), wherein the Court interpreted D. C. CODE ANN. §24-301 to include the purpose of obtaining evidence on whether the jury should be instructed on the issue of insanity.

those facts and others that may have been introduced in evidence, as well as his observation of the defendant in the courtroom and during any examination made to determine the defendant's ability to stand trial . . . "

This argument was best met and refuted in Alexander v. United States, supra, wherein that Court stated as follows at page 39:

"It would violate judicial common sense to permit a defendant to invoke the defense of insanity and foreclose the Government from the benefit of a mental examination to meet this issue . . .

. . . To place the burden of proof on this issue on the Government and at the same time to deprive the Government of an opportunity for a mental examination of the defendant would lead to an absurdity and would be a travesty on justice " [citation omitted].

It is submitted that the ever-important search for the truth, bearing in mind the protection of both individual and society, is not a quest to be borne by the accused alone. The Government, in order to best perform its duty of protecting its citizens, must be allowed to share in that search for the truth, as long as the methods employed in such search remain within the dictates of

the United States Constitution.

It should be noted in this connection that valid distinctions exist between a court-appointed psychiatric examination and any other context in which an accused is compelled to cooperate by divulging information. 5/ Said distinction arising from the nature of the trial in which insanity is raised as a defense, are that (1) such a defense is raised by an accused; (2) if the defense is raised, however, the Government must bear the ultimate burden of proof beyond a reasonable doubt; and (3) that the information essential in carrying that burden of proof can only be obtained, in most cases, from the accused himself. 6/ With these distinctions in mind, the court in Pope v. United States, supra, clearly rejected a constitutional attack on a court-ordered psychiatric examination and stated at page 720 as follows:

> "Certainly, the criminal trial is still a search for truth subject, of course, to constitutional guaranties. It would be a strange situation indeed, if first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, if the government is to have the burden of proof, as it does with the competency issue in the case, Davis

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5/ Karsh, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia" 70 Yale Law Journal 905, 919-920.

6/ Id at 919, n. 73.

v. United States, 160 U.S. 469, 486, 488, 16 S.Ct. 353, 40 L.Ed. 499 (1895), and yet it is to be denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden. Yet that is precisely what the defense claims is appropriate here."

In State v. Whitlow, 45 N.J. 3, 210 A.2d 763 (1965), the New Jersey Supreme Court approved the appointment of state psychiatrists to examine an accused, over his objection, as to his sanity at the time of the commission of the offense. In rejecting an argument based on the privilege of self-incrimination, the Whitlow court expressed its reasoning at page 769 as follows:

"It would be most anomalous to say that a defendant may advance the defense of insanity, have himself examined by his own experts and then invoke the constitutional guarantees against self-incrimination for the purpose of preventing examination by the State . . . [citation omitted]. It would be a strange doctrine, indeed, to permit a person charged with crime to put in issue his want of mental capacity to commit it, and in order to make his plea invulnerable, prevent all inquiry into his mental state or condition

> . . . [citation omitted]. To allow the accused to obtain his own expert, and after a private and unlimited conference with him, to plead insanity, and then put forward the privilege against self-incrimination to frustrate like activities by the prosecution is to balance the competing interests unfairly and disproportionately against the public . . . " 7/

b. Reasonable cause existed for the ordering of the psychiatric examination to determine (1) defendant's mental competency to stand trial and (2) whether or not he was legally insane at the time of the offense.

On December 27, 1966, defendant's counsel sought and obtained an order appointing psychiatrist to examine the defendant. Prior to such an order being signed by the Honorable Jesse W. Custis, Federal District Court Judge, defendant's counsel moved for an order vacating said appointment. This latter motion was also granted [T.R., p. 3]. These motions were made within thirty-five days from the date of the commission of the robbery in question [R. T., pp. 69-70].

On January 5, 1967, defendant's counsel moved for and was granted an order directing the United States Marshal to

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7/ See also State v. Meyers, 220 S. C. 309, 67 S. E. 2d (1951), relied on by Whitlow, supra, wherein the Meyers court also rejected a self-incrimination and due process attack on a compulsory psychiatric examination.

produce the defendant at the office of Frederick J. Hacker, M.D. for the purpose of conducting a psychiatric examination [T.R., p. 4-6]. It was on this latter date, and contemporaneous with the defendant's motion, that the Government first made its motion for the appointment of a psychiatrist [T.R., pp. 4-6], after having been apprised by defendant that he was going to raise the issue of insanity as a defense [see T.R., p. 13]. In addition, since all of defendant's motions were made within a relatively short period after the commission of the offense charged, further reasonable cause existed to support a belief that he was mentally incompetent to stand trial. Such reasonable cause may be inferred in that the defendant on December 27, 1966, made the motion for an order appointing a psychiatrist and such motion, in order to have been granted, must have been made in good faith or on grounds not deemed frivolous. See Lebron v. United States, 299 F.2d 16 (D.C.Cir. 1956), cert. denied, 351 U.S. 974 (1956). Having such reasonable cause to question the defendant's mental competency to stand trial, along with the fact such reasonable cause was evident shortly over a month's period of time from the date of the offense, reasonable cause existed to believe that the defendant may have been legally insane at the time of the offense, or, at least, that the defendant would tender such a defense at trial. 8/ Such reasonable cause would have been evident even had defense counsel not informed the Government that the defendant was going

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8/ It is noteworthy that the sole defense raised at trial was, in fact, that of defendant's insanity at the time of the commission of the crime.

to raise the defense of insanity at trial [See T. R. pp. 13 and 18]. 9/

The Government asserts, based on the foregoing, that once the trial court was under a duty to order a mental examination pursuant to §4244, no error was committed by including in such an order, pursuant to its "inherent power", a requirement that defendant also submit to examination concerning his mental competency at the time of the commission of the offense. Upon the giving of adequate notice of the scope of the inquiry as detailed by the "Order Appointing Psychiatrist" filed January 10, 1967 [T. R., pp. 5-6], due process was afforded to the defendant. See United States v. Driscoll, supra at 137-8, reh. denied, supra at 141. 10/

c. Defendant's privilege against self-incrimination was not violated because no "statements" of the defendant made to a court-appointed psychiatrist were introduced at trial.

Title 18, United States Code, §4244 provides, in part, as follows:

9/ See United States v. Albright, supra at 722 in which a period of approximately eleven months had elapsed between date of the offense and the granting of the order for psychiatric examination.

10/ The entire discussion above is based on the assumption that the order requiring an accused to submit to an examination as to his sanity at the time of the commission of the offense, such order being made under the trial court's "inherent power" but included in an order made pursuant to Title 18, United States Code, §4244, is encumbered with the same restriction of "reasonable cause".

" . . . No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding . . . . " [Emphasis added.]

From a reading of this portion of §4244 it clearly appears that Congress was appreciative of the possibility of an accused refusing to consent to being examined by a court-appointed psychiatrist prior to trial. As so limited, however, §4244 would bar, at trial, all statements made by the accused during such an examination from being introduced on the issue of an accused's guilt. A review of the trial record herein will reflect that the only person that elicited any statement made by the defendant to a court-appointed psychiatrist was counsel for the defendant [See, e.g. R.T., pp. 511-512].

The evidentiary restriction clearly enunciated in §4244 adequately protects an accused's privilege against self-incrimination, especially, in cases like the one at hand, where the issue of guilt or innocence in a factual sense is no longer extant at the time the court-appointed psychiatrists testify. 11/

11/ See Ashton v. United States, 324 F.2d 399 (D.C. Cir. 1963) which indicates a relaxation of §4244 restrictions where (Continued)

2. The Trial Court Acted Reasonably in Conditioning Defendant's Assertion of an Insanity Defense at Trial Upon His Cooperating with Court-Appointed Psychiatrists.

The trial court properly concluded, based on the foregoing discussion, that defendant could not refuse to cooperate with the court-appointed psychiatrists by invoking his privilege against self-incrimination [Memorandum Opinion, T.R., pp. 13-16]. The defendant, on advice of counsel refused to cooperate with any psychiatrists other than those of his own choosing [T.R., pp. 18-19]. He was then ordered to cooperate with court-appointed counsel or be precluded from offering any evidence upon the defense of insanity [T.R., p. 22].

As demonstrated in the discussion above, the defendant had the duty to comply and not the right to refuse to comply with the trial court's order to submit to an examination by court-appointed psychiatrists. The order conditioning the raising of an insanity defense on cooperating with the court-appointed psychiatrists was obviously designed to effectively compel compliance with the trial court's order appointing said psychiatrists. In the recent case of State v. Obstein, 52 N.J. 516, 247 A.2d 5 (1968), the New Jersey Supreme Court stated at page 12, in dictum, as follows:

11/ (Continued)
there is no longer an issue as to whether an accused committed the acts which constitute the offense.

"If a defendant stands mute at the examination or cooperates except for a refusal to discuss the alleged criminal event, at the trial his own psychiatrists will not be permitted over the State's objection to testify to the history of the event given to them. [citing State v. Whitlow, supra]. Further if, as is generally the case, defendant's psychiatrists required the history in order to form an opinion as to insanity, they would be precluded from testifying to that opinion." 12/

The Government submits, therefore, that the trial court issued its order appointing the psychiatrist on a proper and reasonable condition designed to promote compliance thereto and a just trial of the issues. A review of the record will clearly reflect that the trial herein denied neither party its right to a fair trial on the merits. Neither the Government nor the accused is entitled to a favorable verdict based on surprise or secrecy. See Featherson v. Clark, 293 F. Supp. 508, 517 (W.D. Texas 1968).

12/ See also, State v. Whitlow, supra, at 775 where it was stated that:

"If a defendant is capable mentally of cooperating to the extent deemed necessary by the doctors, and he fails or refuses to do so, on motion of the state the defense psychiatric testimony shall be limited to the same extent . . . ."

B. THE TRIAL COURT DID NOT ERR BY INSTRUCTING THE JURY ON THE DEFENSE OF INSANITY IN THE TERMS OF THE TEST PRESENTLY APPROVED BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, NAMELY THAT INSTRUCTION CONTAINED IN MATHES AND DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, §10.14.

1. The Underlying Rationale Expressed in Sauer v. United States, 341 F.2d 640 (9th Cir. 1957), cert. denied, 354 U.S. 940 (1957) Remains Viable Today.

Defendant urges that this Court adopt the insanity test proposed by the American Law Institute which provides as follows:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect, he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."13/

In Sauer v. United States, supra, this Court refused to depart from the insanity test approved by the United States

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13/ MODEL PENAL CODE, §4.01 (Proposed Official Draft 1962); See Supplemental Record on Appeal, "DEFENDANT'S PROPOSED SPECIAL JURY INSTRUCTION NO. 1".

Supreme Court in the case of Davis v. United States, 165 U.S. 373 (1897). The test approved in Davis v. United States, supra at 378 was expressed as follows:

> " The term 'insanity' as used in this defense means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or unconscious at the time of the nature of the act he is committing, or where, though conscious of it and able to distinguish between right and wrong and know that the act is wrong, yet his will, by which is meant the governing power of his mind, has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control." 14/

Such a formulation was, in essence, the instruction given below [R.T., pp. 621-622]. Although in Sauer v. United States, supra, the Court dealt with a proposed adoption of the test enunciated in Durham v. United States, 214 F.2d 862 (D.C.Cir. 1954), its language is equally applicable in the present case. The Court in Sauer v. United States, supra,

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14/ This test is commonly referred to as the "M'Naghten plus irrestible impulse test".

recognized at page 650 that

> ". . . there is another, and possibly the most significant reason, why this Court must refuse to modify existing law. Many observers implicitly assume in their criticism of present law that if the accused is set free on the criminal side that he will be confined on the civil. Unfortunately that is not the case. If it were, this court might be much more disposed to alter its current views. The choice today in this jurisdiction is not between confinement and commitment, but rather between confinement and freedom."

The Sauer Court therefore concluded at page 652 that

> ". . . it is not for this court to undertake a drastic revision in the concept of criminal responsibility, a task which would necessitate a searching analysis of philosophies, purposes, and policies of the criminal law, and which might substitute freedom of insane persons for either confinement or commitment. If change there is to be, it must come from a higher judicial authority, or from the Congress."

The above-quoted reasoning of the Court in Sauer v.

United States, supra, retains its validity today, as no federal commitment procedure exists, with the exception of that of the District of Columbia, by which an accused, acquitted on the grounds of mental irresponsibility, would be subjected to formal observation and treatment. 15/

An acceptable standard of responsibility in the federal courts, however verbalized, must in the last analysis, reflect the moral judgment of the community as to whether it is just to punish a defendant in view of his mental condition at the time of the crime. Basically, this standard flows from the presuppositions of our Judeao-Christian heritage that punishment properly may be imposed only upon a free agent, acting with a guilty mind, and, conversely, that one whose power of free choice -- i.e., whose moral sensibilities are overborne as a consequence of mental disease -- may not ethically be the object of society's censure. This fundamental premise springs from society's paramount interest in civilized self-preservation. In order to survive, a civilized community must assure that those who have defied its fundamental rules for the protection of persons and property--whether they have done so as a result of

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15/ See D. C. Code Ann. §24-301(d) which provides as follows:

> "If any person tried upon an indictment or information for an offense, or tried in the Juvenile Court of the District of Columbia for an offense, is acquitted on the ground that he was insane at the time of its commission, the court shall order such person to be confined in a hospital for the mentally ill."

mental illness and are in need of psychiatric care, or freely and with a guilty mind--are deterred from breaking them again. A workable standard of insanity must, therefore, accommodate both our moral sense of justice and our concern for safety and order; it must, in short, impose blame only when it is morally conscionable to do so, and, at the same time, avoid wherever possible the release of law-breakers who, while they may have emotional and mental problems, could have conformed to the requirements of law had they but exercised their existing thought processes and capacity for self restraint.

This standard -- which makes moral blameworthiness the touchstone of whether to place an individual in restraint or to give him his liberty -- might be subject to relaxation if there were a choice between convicting and imprisoning an accused raising the insanity defense, and acquitting him and placing him in a mental institution for examination and treatment; for then either disposition would avoid the immediate release of one who might as a consequence of his mental illness repeat his pattern of antisocial conduct. Such circumstances, in which both the individual and community would gain from expert therapy in the setting of a mental hospital, might justify a treatment, rather than morally oriented standard of criminal responsibility. Such a possibility, however -- hospitalization and formalized treatment of a defendant acquitted on grounds of mental irresponsibility -- while available in some form or another in the vast majority of the states and in the District of Columbia is not available in other federal

jurisdictions. In this Circuit, as in nine other Circuits, the choice, where an insanity defense is interposed, lies only between sending an accused to prison, with its limited opportunities for concerted psychiatric treatment, or setting him free of any federal restraint. It is not meant to be implied that because of these narrow choices psychiatric trial testimony in the federal courts should be restricted or that a jury should be concerned only with questions of "right and wrong". On the contrary, the Government proposes the widest latitude for expert testimony and believes that in passing on claims of insanity the jury should be directed in the clearest possible terms to evaluate an accused's entire personality -- i.e., his capacity for choice and his ability to control his conduct, as well as his knowledge of the nature and meaning of his acts and his conscious awareness of those acts. The Government urges only that the immediate consequences of an acquittal in the federal courts -- the freeing of the accused from restraint -- should have a critical bearing on the choice of an appropriate standard of responsibility; it should tip the scales in favor of an approach which retains as its core the concept of moral responsibility.

Where a finding of not guilty by reason of insanity usually results not in a defendant going free of societal control, but in the restraint of hospitalization, there is more leeway for the adoption of a test which rests to a measurable degree on purely medical considerations. For example, a finding of insanity in the District of Columbia results not in a defendant's immediate

freedom, but in his confinement in a mental hospital at least for a determination of present mental competency and dangerousness.

The interest in public safety and security would strongly militate against the adoption of a medically oriented standard where no corresponding system of commitment statutes are in force at all. Accordingly, when the issue of insanity is raised at a criminal trial held in a federal district court outside the District of Columbia, the crucial choice is not between imprisonment and hospitalization. The much more difficult issue is raised of whether to impose the restraint of imprisonment or chance the danger of a repetition of anti-social behavior by immediate release of the defendant into the community whose laws he has just violated. In such circumstances, the public safety, as well as the humanitarian desire to treat the mentally ill wrongdoer, reinforce the need to retain a morally oriented standard of responsibility.

The necessarily close relationship and interaction between the insanity defense and the ready availability of commitment procedures has been various commented upon. As Mr. Justice Clark trenchantly pointed out in Lynch v. Overholser, 369 U.S. 705, 720 (1962) [dissenting on other grounds] that the

> " . . . insane offenders are no less a menace to society for being held irresponsible, and reluctance to impose blame on such individuals does not require their release. The community has an interest in protecting the

public from antisocial acts whether committed by sane or insane persons. We have long recognized that persons who because of mental illness are dangerous to themselves or to others may be restrained against their will in the interest of public safety and to seek their rehabilitation. . . . "

In sum, until there are uniform commitment procedures applicable to acquitted defendants in federal criminal cases -- by Congressional enactment or some other formalized state-federal arrangement -- the test for insanity in the federal courts in most cases realistically involves the determination, not of who shall go to a mental hospital and who shall go to prison, but of who shall go free rather than be held in restraint. Since that is the ultimate issue, the insanity test must, of necessity, rest on considerations of moral blameworthiness.

It is worthy to note in this regard that the American Law Institute, in a related section of the MODEL PENAL CODE, provides for mandatory commitment to a mental institution of a defendant acquitted under an insanity plea. 16/ In such a statutory

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16/ MODEL PENAL CODE, §4.08 (Proposed Official Draft 1962) which provides as follows:

"When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court shall order him to be committed to the custody of the Commissioner of Mental Hygiene [Public Health] to be placed in an appropriate institution for custody, care and treatment."

framework -- where there need be no concern that a finding of not guilty risks the danger of an immediate repetition of anti-social behavior by the acquitted defendant -- there may be justification for the adoption of a test which lends itself to the acquittal of the medically ill, albeit morally blameworthy defendant, on the theory that both the accused and society will be better served by treatment of the accused in a mental hospital instead of his incarceration in prison.

2. The Holding of Sauer v. United States, supra, Has Been Consistently Re-affirmed in This Circuit, And There is Nothing in the Record of This Case Which Justifies a Departure From Those Rulings.

In Smith v. United States, 342 F. 2d 725 (9th Cir. 1965), the defendant therein requested an instruction based on MODEL PENAL CODE §4.01. A clinical psychologist had testified that Smith was a paranoid schizophrenic; that his condition was severe, having begun during adolescence, and was operative at the time of the crime; that his actions were beyond his control; at the time of the crime Smith did not know right from wrong; and as a result of the disease which Smith suffered, he was not possessed of substantial capacity to conform his conduct to the requirement of the law. Cf. Smith v. United States, supra, at 726. After reviewing the decision in Wion v. United States, 325 F. 2d 420 (10th Cir. 1963), cert. denied 377 U.S. 946 (1964), which adopted

the MODEL PENAL CODE §4.01 formulation, the Smith court rejected said decision after not finding it "sufficiently persuasive to change the rules of this Circuit as set forth in Sauer." Smith v. United States, supra at 726.

In the recent decision of Ramer v. United States, C.A. 21,985 (9th Cir. May 15, 1969), a panel of this Circuit once again rejected a request to depart from the insanity test expressed in Sauer v. United States, supra. In Ramer v. United States, supra at 20, the court recognized that there was

> "evidence before the jury from which it might have been concluded that, while the appellant knew right from wrong and understood the nature of his act, he still, because of the condition of his mind, committed acts which were beyond his control, i.e., were uncontrollable acts . . . . " 17/

The defendant therein had requested a jury instruction in the terms of the MODEL PENAL CODE §4.01 formulation. Ramer v. United States, supra at 11, n. 10. The trial court in Ramer had rejected the proposed instruction and instructed the jury in almost the identical terms as were employed by the trial

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17/ The psychiatrists who testified had concluded that Ramer suffered from a character disorder which was usually manifested by "poor impulse control". Ramer v. United States, supra at 20.

herein. Ramer v. United States, supra at 10, n. 8. The Ramer Court, after reiterating its holding in Maxwell v. United States, 368 F. 2d 735 (9th Cir. 1966) that the instruction given embodies the "uncontrollable act" test, found no error had been committed and that said instruction was "as favorable to the appellant as he was entitled". Ramer v. United States, supra at 20.

The Government submits that a review of the testimony of Drs. Hacker and Cohn, as set forth in Appellant's Opening Brief at pages 19-21, reflects no facts or opinions upon which a meaningful distinction could be drawn between the case herein and those of Smith v. United States, supra, and Ramer v. United States, supra. The defendant has not adequately demonstrated that the evidence in this case warrants a departure from the long-approved insanity test of this Circuit, nor has he demonstrated that prejudice resulted from a failure to give his proffered instruction. Under such circumstances, it is urged that the case herein is not an appropriate one to adopt a new formulation with respect to mental culpability. 18/

18/ It should be noted that this Circuit has also considered and refused to reject the holding in Sauer v. United States, supra, in the following cases: Johnson v. United States, 406 F. 2d 1111 (9th Cir. 1969); Oliver v. United States, 396 F. 2d 434 (9th Cir. 1968); Ramer v. United States, 390 F. 2d 564 (9th Cir. 1968); and Church v. United States, 390 F. 2d 564 (9th Cir. 1968).

CONCLUSION

Based on the foregoing discussion, the Government respectfully submits the following conclusions:

(1) No error was committed by the trial court in conditioning defendant's raising of his insanity defense upon his submitting to a mental examination by a court-appointed psychiatrist and his affording said psychiatrist such cooperation and information as may be required in properly conducting said examination.

(2) The trial court properly refused defendant's proposed insanity instruction and correctly instructed the jury as to the test applied in the United States Court of Appeals for the Ninth Circuit.

> "The right and wrong test has withstood the onslaught of critics, not because it is scientifically perfect, but because the courts regard it as the best criteria yet articulated for ascertaining criminal responsibility which comports with the moral feelings of the community."

Sauer v. United States, supra at 649.

Respectfully submitted,

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